No. 09-1353

In the Supreme Court of the United States

IRON THUNDERHORSE, PETITIONER

v.

BILL PIERCE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS CHAPLAINCY DIRECTOR OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the court of appeals erred in its application of the "least restrictive means" test of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. 2000cc *et seq.*, in upholding a prison grooming policy that prohibits inmates from growing long hair.

TABLE OF CONTENTS

Page

Statement 1
Discussion 7
A. The courts of appeals are in agreement about how to apply RLUIPA's "least restrictive means" standard 8
B. The court of appeals in this case erroneously departed from accepted standards governing inmates' RLUIPA claims 18
Conclusion 21

TABLE OF AUTHORITIES

Cases:

Baranowski v. *Hart*, 486 F.3d 112 (5th Cir.), cert. denied, 552 U.S. 1062 (2007) 16, 17
City of Boerne v. *Flores*, 521 U.S. 507 (1997) 6
Cutter v. *Wilkinson*, 544 U.S. 709 (2005) 6, 8, 14
Diaz v. *Collins*, 114 F.3d 69 (5th Cir. 1997) 5, 6, 7, 12
Fegans v. *Norris*, 537 F.3d 897 (8th Cir. 2008) 14, 15
Gonzales v. *O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006) 12, 13
Gooden v. *Crain*, 353 Fed. Appx. 885 (5th Cir. 2009) 14, 20
Grutter v. *Bollinger*, 539 U.S. 306 (2003) 8
Hamilton v. Schriro, 74 F.3d 1545 (8th Cir.), cert. denied, 519 U.S. 874 (1996) 13
Hoevenaar v. *Lazaroff*, 422 F.3d 366 (6th Cir. 2005), cert. denied, 549 U.S. 875 (2006) 11, 17
Jova v. *Smith*, 582 F.3d 410 (2d Cir. 2009), cert. denied, 130 S. Ct. 2111 (2010) 10

Cases—Continued: Page

Koger v. *Bryan*, 523 F.3d 789 (7th Cir. 2008) 11
Lathan v. *Thompson*, 251 Fed. Appx. 665 (11th Cir. 2007) 11
Longoria v. *Dretke*, 507 F.3d 898 (5th Cir. 2007) ... 5, 7, 18
Lovelace v. *Lee*, 472 F.3d 174 (4th Cir. 2006) 10
Mayfield v. *TDCJ*, 529 F.3d 599 (5th Cir. 2008) 15, 20
McRae v. *Johnson*, 261 Fed. Appx. 554 (4th Cir. 2008) 14
Murphy v. *Missouri Dep't of Corr.*, 372 F.3d 979 (8th Cir.), cert. denied, 543 U.S. 991 (2004) ... 10, 11, 13
Newby v. *Quarterman*, 325 Fed. Appx. 345 (5th Cir. 2009) 12, 15, 20
Odneal v. *Pierce*, 324 Fed. Appx. 297 (5th Cir. 2009) 12, 19, 20
Sherbert v. *Verner*, 374 U.S. 398 (1963) 13
Smith v. *Ozmint*, 578 F.3d 246 (4th Cir. 2009) 12
Sossamon v. *Texas*, 560 F.3d 316 (5th Cir. 2009), cert. granted, No. 08-1438 (argued Nov. 2, 2010) 10, 15
Spratt v. *Rhode Island Dep't of Corr.*, 482 F.3d 33 (1st Cir. 2007) 10, 14, 15
Warsoldier v. *Woodford*, 418 F.3d 989 (9th Cir. 2005) 11, 13, 15, 18
Washington v. *Klem*, 497 F.3d 272 (3d Cir. 2007) 10
Williams v. *Snyder*, 367 Fed. Appx. 679 (7th Cir.), cert. denied, 131 S. Ct. 343 (2010) 14

Statutes: Page

Civil Rights of Institutionalized Persons Act of 1995, 42 U.S.C. 1997 2
Prison Litigation Reform Act, 42 U.S.C. 1997e(a) 14
Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.* 6
42 U.S.C. 2000bb-1(a) 6, 13
Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. 2000cc *et seq.*:
42 U.S.C. 2000cc-1 2
42 U.S.C. 2000cc-1(a) 6, 8, 18
42 U.S.C. 2000cc-2(b) 2, 8
42 U.S.C. 2000cc-5(2) 2, 8
42 U.S.C. 1983 4

Miscellaneous:

146 Cong. Rec. 16,699 (2000) 9
S. Rep. No. 111, 103d Cong., 1st Sess. (1993) 9
Texas Department of Criminal Justice, *Offender Orientation Handbook*, Ch. 1, § III.A (Nov. 2004), http://www.tdcj.state.tx.us/publications/cid/OffendOrientHbkNov04.pdf 3

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Acting Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied, or, in the alternative, should be granted and the decision below summarily reversed and remanded for application of the correct legal standard.

STATEMENT

1. Congress enacted the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. 2000cc *et seq.*, to provide statutory protection against religious discrimination—including unequal treatment of religions in the provision of accommodations and unjustified infringement of the free exercise of

religion—by state and local governmental entities. The statute applies to two specific contexts: land use regulation and institutionalization. The provision at issue in this case is Section 3 of RLUIPA, which provides:

> (a) General rule. No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 2 of the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997), even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. 2000cc-1. Section 4 of RLUIPA specifies that a "plaintiff shall bear the burden of persuasion on whether" a challenged law "substantially burdens the plaintiff's exercise of religion." 42 U.S.C. 2000cc-2(b). Section 6, in turn, makes clear that the government defendant bears the burdens of proof and persuasion on whether any burden imposed is the least restrictive means of furthering a compelling governmental interest. 42 U.S.C. 2000cc-5(2) (defining "demonstrates" to mean "meets the burdens of going forward with the evidence and of persuasion").

2. Petitioner is a prisoner in the custody of the Texas Department of Criminal Justice (TDCJ). Pet. App. 2a. In its Offender Orientation Handbook, TDCJ mandates the following cleanliness and grooming standards for male and female offenders, respectively:

> Male offenders must keep their hair trimmed up the back of their neck and head. Hair must be neatly cut. Hair must be cut around the ears. Sideburns will not extend below the middle of the ears. No block style, afro, natural or shag haircuts will be permitted. No fad or extreme hairstyles/haircuts are allowed. No mohawks, tails, or designs cut into the hair are allowed.
>
> Female offenders will not have extreme hairstyles. No mohawk, "tailed" haircuts or shaved/partially-shaved heads will be allowed. Female offenders may go to the beauty shop on their unit; however, going to the beauty shop is a privilege. Female offenders may be restricted from going to the beauty shop as the result of disciplinary action.

Pet. 3-4; see TDCJ, *Offender Orientation Handbook*, Ch. 1, § III.A, at 10-11 (Nov. 2004), http://www.tdcj.state.tx.us/publications/cid/OffendOrientHbkNov04.pdf. The handbook does not provide that exemptions from the grooming policy are available to accommodate religious practices.

Petitioner practices Native American Shamanism. Pet. App. 4a. In 2004, he was transferred from the Stiles Unit of the TDCJ to the Polunsky Unit. *Ibid.* According to his complaint, petitioner was able to maintain long hair, with braids falling to his lower back, as he alleges his religion requires, before he was transferred to the Polunsky Unit. *Ibid.* Petitioner also alleges that he was permitted other religious accommodations—such as wearing a colored headband, performing pipe ceremonies, and possessing other religious items—while in the general population and while in administrative segregation before his transfer to the Polunsky unit. *Ibid.* Af-

ter his transfer, petitioner alleges that guards at the Polunsky Unit confiscated his medicine bag, religious medallion, and quartz crystal. *Id.* at 5a. He further alleges that the harassment led to an altercation with a prison guard, which resulted in petitioner's being placed in administrative segregation, where he is not permitted to attend pipe ceremonies, conduct a pipe ceremony in his cell, or possess a flute or drum. *Ibid.* In addition, TDCJ does not allow petitioner to wear a colored headband, and refused to grant him an exception to its hair length restrictions so that he may maintain long hair in accordance with the tenets of his religion. *Id.* at 2a, 5a.

3. In October 2004, petitioner filed suit pro se under 42 U.S.C. 1983 and RLUIPA, alleging violations of his federal constitutional and statutory rights. Pet. App. 3a, 20a. Specifically, petitioner challenged TDCJ's (1) confiscation of various religious items, (2) denial of programs for shamans, (3) denial of a racial category for "Native Americans," (4) failure to provide exemptions or accommodations to the dress code and grooming code, (5) failure to allow equal services for inmates in segregation, and (6) failure to honor prior agreements that he had entered into with prison officials. *Id.* at 2a-3a, 61a. The case was assigned to a magistrate judge, who granted summary judgment for TDCJ on petitioner's RLUIPA claims. *Id.* at 3a. Petitioner appealed and the court of appeals vacated the grant of summary judgment and remanded for further proceedings. The court found that the magistrate judge had not given petitioner sufficient notice to allow him to properly respond to TDCJ's motions, and that the lack of notice had prevented petitioner from filing a "large amount of evidence." *Ibid.*

On remand, after holding a bench trial, the magistrate judge issued an opinion ordering that: (1) TDCJ

"recognize Native American Shamanism as a valid faith"; (2) petitioner be permitted to request the designation of a reasonable number of holy days and traditional foods for feast days, in conformity with TDCJ regulations; and (3) TDCJ allow petitioner reasonable access to various religious objects in the event that he is released from administrative segregation. Pet. App. 3a-4a. The judge denied all of petitioner's other requests for relief. *Ibid.* Regarding TDCJ's grooming policies, the magistrate judge held that petitioner's claim was foreclosed by a prior Fifth Circuit ruling that "upheld the dismissal of an inmate's challenge to the TDCJ's grooming code based on religious reasons." *Id.* at 69a (citing *Longoria* v. *Dretke*, 507 F.3d 898, 904 (5th Cir. 2007)).

4. Petitioner again appealed, challenging, among other things, the magistrate judge's dismissal of his RLUIPA claims. Pet. App. 2a. He argued that "the magistrate judge failed to analyze his claims under RLUIPA's compelling interest, least-restrictive-means standard of review." *Id.* at 8a. The court of appeals affirmed in an unpublished per curiam opinion. *Id.* at 1a-19a.

The court of appeals held that the magistrate judge correctly dismissed petitioner's RLUIPA challenge to TDCJ's grooming policy as foreclosed by circuit precedent. Pet. App. 8a. The court relied on *Diaz* v. *Collins*, 114 F.3d 69 (5th Cir. 1997), and *Longoria*, *supra*, both of which concerned challenges to prison grooming policies on the ground that the policies imposed a substantial burden on the religious exercise of inmates who wanted to grow long hair for religious reasons. Pet. App. 8a-9a. In each case, the court of appeals noted, the grooming policy in question was upheld as "the least restrictive

way to serve a compelling governmental interest—prison security." *Ibid.*

As the court of appeals explained, Pet. App. 9a-10a, *Diaz* arose under RLUIPA's predecessor statute, the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.*, before this Court invalidated that statute as applied to the States and their subdivisions. See *City of Boerne* v. *Flores*, 521 U.S. 507, 532-536 (1997); see also *Cutter* v. *Wilkinson*, 544 U.S. 709, 714-715 (2005) (describing background of RLUIPA). Like Section 3 of RLUIPA, RFRA requires governmental entities to justify imposing a substantial burden on religious exercise by demonstrating that doing so is the least restrictive means of furthering a compelling governmental interest. Compare 42 U.S.C. 2000bb-1(a) with 42 U.S.C. 2000cc-1(a). The court in *Diaz* found that TDCJ's grooming code was the least restrictive means of furthering the government's compelling interest in security because it prevented inmates from hiding weapons and other contraband in their hair and made it more difficult for escaped prisoners to alter their appearance. 114 F.3d at 73; see Pet. App. 9a. The *Diaz* court concluded that "the security interest at stake cannot meaningfully be achieved appropriately by any different or lesser means than hair length standards." 114 F.3d at 73. The court of appeals in this case observed that TDCJ had introduced "similar evidence" here, and that the Regional Director of the TDCJ had also testified that the policy prevented hair-grabbing during altercations. Pet. App. 9a n.2.

Relying on *Diaz*, the court in *Longoria* rejected a RLUIPA challenge to the same grooming policy that had been at issue in that case. See Pet. App. 9a. Noting that "the test under RLUIPA is sufficiently the same as

that previously imposed under RFRA," the court in *Longoria* upheld the grooming policy without requiring TDCJ "to demonstrate, as it did in *Diaz*, that its grooming policy 'is related to security, and, as such, involves a compelling state interest,' which 'cannot meaningfully be achieved appropriately by any different or lesser means than hair length standards.'" 507 F.3d at 904 (quoting *Diaz*, 114 F.3d at 73).

The court of appeals in this case acknowledged petitioner's argument that the policy could not be "the least restrictive means to maintain prison security[,] because the TDCJ [had] enforce[d] it in an arbitrary manner" (by previously allowing petitioner and other inmates to have long hair) and because "other prison systems, including the Federal Bureau of Prisons, permit long hair." Pet. App. 10a n.3. The court concluded, however, that it was "bound by *Diaz* and *Longoria*," and accordingly affirmed dismissal of petitioner's RLUIPA challenge to TDCJ's grooming policy. *Ibid.*; see *id.* at 10a.[1]

DISCUSSION

As numerous courts of appeals have affirmed, RLUIPA requires defendants to demonstrate that practices that impose substantial burdens on inmates' religious exercise are the least restrictive means of furthering a compelling interest under the facts of the particular case. Although the Fifth Circuit has recognized that principle in other cases, in its unpublished opinion in this case the court erroneously affirmed the dismissal of

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[1] The court also affirmed the magistrate judge's rejection of the remainder of petitioner's claims. Pet. App. 10a-19a. In his petition for a writ of certiorari, petitioner seeks review only of the court of appeals' ruling on his RLUIPA challenge to TDCJ's grooming policy. See Pet. i.

petitioner's RLUIPA challenge to TDCJ's grooming policy without requiring respondent to address record evidence that tended to show that prison officials potentially could further compelling governmental interests through less restrictive means. That case-specific error does not warrant plenary review by this Court. The Court may, however, wish to consider summarily reversing the judgment of the court of appeals and remanding for application of the correct standard.

A. The Courts Of Appeals Are In Agreement About How To Apply RLUIPA's "Least Restrictive Means" Standard

1. Section 3 of RLUIPA prohibits a government from imposing a substantial burden on the religious exercise of an institutionalized person unless the government can demonstrate that the burden is the least restrictive means of furthering a compelling governmental interest. 42 U.S.C. 2000cc-1(a). Although a plaintiff bears the burden of establishing that a challenged practice substantially burdens his religious exercise, see 42 U.S.C. 2000cc-2(b), RLUIPA places the burden on defendants to justify such a burden under the compelling-interest/least-restrictive-means test, 42 U.S.C. 2000cc-2(b), 2000cc-5(2).

In upholding RLUIPA against an Establishment Clause challenge in *Cutter* v. *Wilkinson*, 544 U.S. 709 (2005), this Court noted that "[c]ontext matters" in the application of RLUIPA's substantive standard. *Id.* at 723 (quoting *Grutter* v. *Bollinger*, 539 U.S. 306, 327 (2003)). The Court acknowledged that the lawmakers supporting RLUIPA "anticipated that courts would apply the Act's standard with 'due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to

maintain good order, security and discipline, consistent with considerations of costs and limited resources.'" *Ibid.* (quoting *Joint Statement of Senator Hatch and Senator Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000*, 146 Cong. Rec. 16,699 (2000) (*Joint Statement*)); *id.* at 725 n.13 ("It bears repetition, however, that prison security is a compelling state interest, and that deference is due to institutional officials' expertise in this area."). Those lawmakers also recognized, however, that "inadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations will not suffice to meet the act's requirements." *Joint Statement*, 146 Cong. Rec. at 16,699 (quoting S. Rep. No. 111, 103d Cong., 1st Sess. 10 (1993)).

2. As a general matter, courts of appeals evaluating prisoners' RLUIPA claims have correctly enforced RLUIPA's allocation of burdens. In so doing, they have appropriately balanced the deference due to the expertise of prison administrators with RLUIPA's requirement that defendants do more to justify the imposition of a substantial burden on religious exercise than rely on speculation or unjustified fears. Courts have performed that balancing by requiring prison administrators to offer evidence—usually in the form of affidavits from prison officials—explaining how the imposition of an identified substantial burden furthers a compelling governmental interest and why it is the least restrictive means of doing so, with reference to the circumstances presented by an individual case. Once a defendant has offered such evidence, courts have granted due deference to the expertise brought to bear in formulating the prison's policies.

a. The First Circuit, for example, has made clear that prison officials must "do more than merely assert a security concern" in order to justify imposing a substantial burden. *Spratt* v. *Rhode Island Dep't of Corr.*, 482 F.3d 33, 39 (2007) (quoting *Murphy* v. *Missouri Dep't of Corr.*, 372 F.3d 979, 988 (8th Cir. 2004), cert. denied, 543 U.S. 991 (2004)). Although that court recognized that "prison officials are to be accorded deference in the way they run their prisons," the court explained that "this does not mean that [the court] will rubber stamp or mechanically accept the judgments of prison administrators." *Id.* at 40 (internal quotation marks and citation omitted). Other courts of appeals agree. See, *e.g.*, *Jova* v. *Smith*, 582 F.3d 410, 415 (2d Cir. 2009) (noting that "the state may not merely reference an interest in security or institutional order in order to justify its actions; rather, 'the particular policy must further this interest'; and must be more than conclusory") (internal citation omitted), cert. denied, 130 S. Ct. 2111 (2010); *Washington* v. *Klem*, 497 F.3d 272, 283 (3d Cir. 2007) ("Even in light of the substantial deference given to prison authorities, the mere assertion of security or health reasons is not, by itself, enough for the Government to satisfy the compelling governmental interest requirement. Rather, the particular policy must further this interest. A conclusory statement is not enough.") (internal citations omitted); *Lovelace* v. *Lee*, 472 F.3d 174, 190 (4th Cir. 2006) ("Here, the first job is to require [the defendant prison] to take the unremarkable step of providing an explanation for the policy's restrictions that takes into account any institutional need to maintain good order, security, and discipline, or to control costs. That explanation, when it comes, will be afforded due deference."); *Sossamon* v. *Texas*, 560 F.3d 316, 335 (5th Cir. 2009)

(noting that a State's "conclusional assertion" regarding the least restrictive means of furthering a compelling interest is not sufficient to justify imposition of a burden), cert. granted, No. 08-1438 (argued Nov. 2, 2010); *Hoevenaar* v. *Lazaroff*, 422 F.3d 366, 370 (6th Cir. 2005) (acknowledging that "the district court is not required to blindly accept any policy justifications offered by state officials"), cert. denied, 549 U.S. 875 (2006); *Koger* v. *Bryan*, 523 F.3d 789, 800 (7th Cir. 2008) ("We can only give deference to the positions of prison officials as required by [*Cutter*] when the officials have set forth those positions and entered them into the record."); *Murphy* at 988-989 ("Although we give prison officials wide latitude within which to make appropriate limitations, they must do more than offer conclusory statements and post hoc rationalizations for their conduct.") (internal quotation marks omitted); *Warsoldier* v. *Woodford*, 418 F.3d 989, 1000 (9th Cir. 2005) (finding that prison's "conclusory statements are insufficient to meet its burden that it has adopted the least restrictive means to achieve [a compelling] interest"); *Lathan* v. *Thompson*, 251 Fed. Appx. 665, 667 (11th Cir. 2007) (unpublished) (per curiam) (remanding a RLUIPA claim to the district court so that prison officials could present evidence that was not "over ten years old" to justify the restriction at issue in that case).[2]

b. The courts of appeals have, moreover, undertaken case-specific evaluations of RLUIPA defendants' asserted justifications for imposing substantial burdens on prisoners' religious exercise. The Fourth Circuit, for example, has rejected prison officials' reliance on an affi-

[2] Neither the Tenth nor D.C. Circuit appears to have addressed the burden RLUIPA places on prison officials to justify imposing a substantial burden on an inmate's religious exercise.

davit justifying a challenged grooming policy, but created for different litigation involving a different institution, because the affidavit "had nothing to do" with the institution at issue in the case and was, therefore, "simply not on point." *Smith* v. *Ozmint*, 578 F.3d 246, 252-254 (2009).

The Fifth Circuit has required that Texas prison officials justify their refusal to grant a religious exemption to TDCJ's grooming rule for the particular type of hair style the inmate seeks to grow. *Odneal* v. *Pierce*, 324 Fed. Appx. 297, 300-301 (2009). In that case, the plaintiff sought permission to grow a long patch of hair at the base of his neck called a kouplock. *Id.* at 301. The court rejected Texas's reliance on *Diaz* v. *Collins*, 114 F.3d 69 (5th Cir. 1997)—one of the two decisions on which the court of appeals relied in this case, see Pet. App. 9a—which upheld application of the grooming rule to long braids. The court explained that "RLUIPA's rules cannot be applied to a particular governmental policy in a generic fashion; it is not enough to say that the 'grooming policy' has been upheld when the case at hand deals with [a requested hairstyle that is] potentially very different from" the one considered in the prior case. *Odneal*, 324 Fed. Appx. at 300. As the Fifth Circuit stated in another case, a court reviewing a prisoner's RLUIPA claim must "'examin[e] the particular facts of the case' before it." *Newby* v. *Quarterman*, 325 Fed. Appx. 345, 351 (2009).[3]

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[3] That approach is consistent with this Court's interpretation of RFRA, which employs the same substantive standard as RLUIPA. In *Gonzales* v. *O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 430 (2006) (*O Centro*), for example, the Court held that the federal government could not satisfy RFRA by arguing that a statutory scheme "simply admits of no exceptions." Rather, "RFRA operates by man-

c. Finally, as a means of ensuring that prison officials demonstrate that the application of a challenged practice to a particular plaintiff is the least restrictive means of furthering a compelling governmental interest, the courts of appeals have required that officials demonstrate that they have considered whether there are alternative, less restrictive means of furthering the relevant interest. No court of appeals requires prison officials to undertake the "herculean burden" of "refut[ing] every conceivable option in order to satisfy the least restrictive means prong of" RLUIPA. *Hamilton* v. *Schriro*, 74 F.3d 1545, 1556 (8th Cir.), cert. denied, 519 U.S. 874 (1996). But the courts of appeals that have reached the question agree that, when there is evidence that potentially less restrictive alternatives exist, prison officials must at least demonstrate that they have "considered and rejected the efficacy of" those alternatives. *Warsoldier*, 418 F.3d at 999; see, *e.g.*, *Washington*, 497 F.3d at 284 (noting that prison must "consider and reject other means before it can conclude that the policy chosen is the least restrictive means"); *Murphy*, 372 F.3d at 989 (remanding for further proceedings where it was "not clear that [the defendant] seriously considered any other alternatives, nor were any explored before the district court"). Consistent with that practice, the courts of appeals have upheld rulings in favor of

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dating consideration * * * of exceptions to 'rule[s] of general applicability.'" *Id.* at 1223 (quoting 42 U.S.C. 2000bb-1(a)). The Court noted that RFRA had expressly adopted the compelling interest test as set forth in cases such as *Sherbert* v. *Verner*, 374 U.S. 398 (1963), in which the "Court looked beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific exemptions to particular religious claimants." *O Centro*, 546 U.S. at 431.

prison defendants when the defendants have explained why specific less restrictive alternatives are not feasible. *E.g.*, *Williams* v. *Snyder*, 367 Fed. Appx. 679, 681-683 (7th Cir.) (unpublished order), cert. denied, 131 S. Ct. 343 (2020); *Gooden* v. *Crain*, 353 Fed. Appx. 885, 889 (5th Cir. 2009) (unpublished) (per curiam); *McRae* v. *Johnson*, 261 Fed. Appx. 554, 559 (4th Cir. 2008) (unpublished) (per curiam); *Fegans* v. *Norris*, 537 F.3d 897, 904 (8th Cir. 2008).

At a minimum, defendants' obligation to address potential alternatives extends to those alternatives specifically identified in the course of the administrative grievance process. Incarcerated persons are required by the Prison Litigation Reform Act of 1995, 42 U.S.C. 1997e(a), to exhaust administrative grievance procedures prior to filing a lawsuit, including a suit to enforce RLUIPA. See *Cutter*, 544 U.S. at 723 n.12. The requirement that an inmate request a religious accommodation through a prison's internal grievance procedures permits prison officials and inmates to work together in the first instance to come up with workable solutions that balance an inmate's religious exercise with an institution's compelling interests. That process also serves the function of developing an evidentiary record about what potential alternatives would be acceptable to a plaintiff and why such alternatives would or would not work for an institution. If an inmate ultimately files suit under RLUIPA, a defendant should be prepared to address the feasibility of potential alternatives identified through the administrative process.

Moreover, when there is evidence in the record that different prison systems—or different prisons within the same system—provide exemptions to a rule that imposes a substantial burden on religious exercise or otherwise

utilize less restrictive means of furthering their interests, the courts of appeals properly require defendants to explain why they cannot adopt those less restrictive practices. *E.g.*, *Fegans*, 537 F.3d at 905; *Kroger*, 523 F.3d at 801; *Spratt*, 482 F.3d at 42; *Warsoldier*, 418 F.3d at 1000. The same is true with respect to evidence that the defendant institution permits exemptions for some purposes, religions, or populations, but not for others. *E.g.*, *Sossamon*, 560 F.3d at 335; *Newby*, 325 Fed. Appx. at 352; *Mayfield* v. *TDCJ*, 529 F.3d 599, 615 (5th Cir. 2008). At the same time, courts recognize that "evidence of policies at one prison is not conclusive proof that the same policies would work at another institution." *Spratt*, 482 F.3d at 42; see *Fegans*, 537 F.3d at 905 ("Although prison policies from other jurisdictions provide some evidence as to the feasibility of implementing a less restrictive means of achieving prison safety and security, it does not outweigh the deference owed to the expert judgment of prison officials who are infinitely more familiar with their own institutions than outside observers."). In the face of evidence that other institutions employ less restrictive means, an institution must satisfy the same burden generally applicable under RLUIPA: it must demonstrate that its practices are the least restrictive means of furthering its compelling interest under the facts at issue in the particular case.

3. Petitioner argues (Pet. 10-11) that the courts of appeals are divided "over the meaning of strict scrutiny under RLUIPA." In particular, petitioner contends that (Pet. 11), although seven circuits "require the government to submit specific evidence and closely examine it on the issue of least restrictive means," the Fifth and Sixth Circuits simply "accept the government's own as-

sertion of what constitutes least restrictive means." That contention is incorrect.

In addition to this case and the *Diaz* and *Longoria* decisions on which it relies, petitioner's assertion about the law in the Fifth Circuit rests on *Baranowski* v. *Hart*, 486 F.3d 112, cert. denied, 552 U.S. 1062 (2007). In *Baranowski*, the Fifth Circuit upheld a district court's determination that Texas did not violate RLUIPA by refusing to provide kosher meals to inmates. *Id.* at 125-126. Although petitioner asserts that the Fifth Circuit in that case reached that conclusion by merely "accept[ing] the assertion of prison officials that denial of a religious diet was 'related to maintaining good order and controlling costs and as such, involves compelling government interests,'" Pet. 13 (quoting *Baranowski*, 486 F.3d at 125), the court in fact based its conclusion on the "uncontroverted summary judgment evidence" prison officials had submitted to justify their choice to offer inmates vegetarian or pork-free meals instead of "either providing a separate kosher kitchen or bringing in kosher food from outside," *Baranowski*, 486 F.3d at 125. That evidence included an affidavit attesting that prison officials had "studied the impact of complying" with requests to provide a separate kosher kitchen or kosher meals from outside the facility, including by examining the practices of the Florida prison system. *Id.* at 118. The affidavit concluded that the cost to Florida of providing kosher meals ($12 to $15 per day per offender, as compared to the $2.46 per day the State of Texas paid for each offender's meals) was not feasible in light of constraints on TDCJ's budget, and that "[p]roviding kosher meals for a very small subset of offenders would place a tremendous burden on the ability of TDCJ to provide a nutritionally appropriate meal to all other

offenders." *Ibid.* In concluding that the record was sufficient to uphold the prison policy, the court of appeals in *Baranowski* did precisely what petitioner appears to suggest a court evaluating such a claim ought to do: it verified that the defendants had provided an actual explanation—not merely conclusory statements—that their practice was the least restrictive means of furthering governmental interests, and that they had considered and rejected potential alternatives, including the practice of a different prison system. *Id.* at 125-126.

In *Hoevenaar*, the Sixth Circuit reversed the grant of a preliminary injunction permitting an inmate to grow a kouplock as an exception to the prison's general grooming policy. 422 F.3d at 369-371. In so doing, the court examined record evidence indicating that the "district court's solution of allowing kouplocks on an individualized basis for low-threat prisoners was not sufficient to protect the state's interest in safe and secure prisons." *Id.* at 371. Although, as petitioner notes (Pet. 16), prison officials had not produced data showing "that previously recognized exceptions had resulted in security incidents," the court of appeals reviewed evidence that "contraband was a problem for all types of prisoners"; that the plaintiff in the case "ha[d] a long history of possessing and hiding contraband," and had "twice attempted to escape from prison, utilizing contraband"; and that "contraband could be hidden in a kouplock, including dangerous items, such as an ice pick," as well as various types of small items the plaintiff "had previously been found guilty of possessing." *Ibid.* The court of appeals, in short, did not rest its decision on "simple assertions of security," Pet. 12; it instead ensured that prison officials had offered a substantive and relevant justification for the burden they were imposing, and that

the officials had considered any alternatives suggested in the case.

Finally, petitioner notes (Pet. 13-18) that some courts of appeals have upheld restrictive grooming policies in the face of RLUIPA challenges while at least one court has granted a preliminary injunction requiring a religious exception to such a policy. See *Warsoldier*, *supra*. That different courts have reached different results in different cases is, however, unremarkable, particularly given RLUIPA's requirement that courts consider the circumstances of the particular parties before it. See 42 U.S.C. 2000cc-1(a) (requiring that defendant justify "imposition of the burden on that person"). Different prison systems, and different facilities within a single prison system, hold different types of inmate populations and are subject to different types and degrees of logistical constraints. The courts of appeals' context-specific decisions do not, as petitioner suggests (Pet. 10, 17), reflect any general disagreement among the courts of appeals about the correct legal standard.

B. The Court Of Appeals In This Case Erroneously Departed From Accepted Standards Governing Inmates' RLUIPA Claims

1. Although petitioner fails to identify a general conflict about the standard applicable to inmates' RLUIPA claims, he is correct that the court of appeals failed to apply the correct standard in this case. In its unpublished, per curiam opinion affirming the dismissal of petitioner's RLUIPA challenge to TDCJ's grooming policy, the court of appeals concluded that the challenge was foreclosed by prior Fifth Circuit decisions rejecting similar challenges brought by prisoners in other TDCJ facilities. Pet. App. 8a-10a (citing *Diaz* and *Longoria*,

supra). But petitioner in this case raised arguments and evidence not addressed in *Diaz* or *Longoria*: that other prison systems (including the federal Bureau of Prisons) permit long hair, and that TDCJ enforces its grooming policy in an inconsistent manner. *Id.* at 10a n.3. The courts below, however, never required respondents to explain why the alternative, less restrictive practices utilized in other prison systems would not work in the Polunsky unit. Nor did they require prison administrators to explain why the previous inconsistent application of the grooming policy to petitioner and to others (including Texas's female inmate population) did not indicate that a less restrictive alternative was appropriate. See *ibid.* Although respondent acknowledges (Br. in Opp. 14-15 (citing *Odneal*, *supra*)) that the Fifth Circuit requires prison officials to justify application of a challenged policy under the facts of a particular case, respondent notably does not even attempt to justify the court of appeals' refusal to hold officials to that standard in this case.

The court of appeals erred in affirming the dismissal of petitioner's RLUIPA challenge in the absence of such explanations. Although courts are certainly entitled to take into account a prior adjudication of the legitimacy under RLUIPA or RFRA of a particular prison practice, RLUIPA's requirement that courts focus on the particular facts of the case before it can make exclusive reliance on such a prior holding inappropriate. What is impossible in one institution or system may be possible—and therefore possibly required under RLUIPA—in another facility or system. In addition, when a subsequent case includes evidence of potentially less restrictive alternatives that was not part of an earlier case, simple reliance on the previous decision cannot suffice under RLUIPA.

As noted above, see p. 12, *supra*, the Fifth Circuit in other cases has recognized that its prior decision in *Diaz* is "not dispositive" of all challenges to TDCJ's grooming policy, and it has emphasized that "RLUIPA's standards cannot be applied to a particular governmental policy in a generic fashion." *Odneal*, 324 Fed. Appx. at 301 (remanding for consideration of application of TDCJ's policy to a plaintiff wishing to maintain a kouplock); see also *Gooden*, 353 Fed. Appx. at 861 n.1. The Fifth Circuit has, moreover, made clear that a RLUIPA defendant bears the burden of "explaining why [a plaintiff's proposed] alternative would be unfeasible, or why it would be less effective in maintaining institutional security," *id.* at 888, and that "allegations of disparate application" of a challenged policy "might provide a reasonable basis for a factfinder to conclude that the [challenged] policy is not the least restrictive means of furthering a compelling government interest," *Newby*, 325 Fed. Appx. at 352; see *Mayfield*, 529 F.3d at 615. By those standards, the court of appeals in this case erred in affirming the magistrate judge's grant of summary judgment to respondent on petitioner's hair-length claim. The court should have remanded the case to allow respondents to respond to petitioner's evidence of potentially less restrictive alternatives.

2. Because the court's error in this case is clear, it may be an appropriate candidate for summary reversal. In any event, for the reasons explained above, see pp. 8-18, *supra*, the court's error does not reflect any general disagreement among the courts of appeals about the correct legal framework under RLUIPA, including the burden a defendant must bear to satisfy the compelling-interest/least-restrictive-means test, that requires resolution by this Court. Unless the Court opts to sum-

marily reverse the court of appeals and remand for application of the correct legal standard, it should deny the petition for a writ of certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied. In the alternative, the Court should grant the petition, summarily reverse the judgment of the court of appeals, and remand for further proceedings.

Respectfully submitted.

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